No. 69.

Reply Br. of Respondent for Petition

Filed Oct. 24, 1899.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
OCT 24 1899
JAMES H. McKENNEY,
Clerk.

THE CANADA SUGAR REFINING COMPANY,
Libellant and Petitioner,

AGAINST

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

No. 69, October Term, 1899.

REPLY TO RESPONDENT'S BRIEF.

First.

It is perhaps irrelevant, in view of what was actually done by the owner and the insurer of the sugars, to determine whether or not the libellant had a legal right to abandon the cargo to the Atlantic Mutual Insurance Company.

Both parties treated the case as though such right of abandonment existed; and both recognized in effect the practical abandonment that was made.

The respondent herein now asserts that there was no right of abandonment under the Atlantic Mutual's policy upon the cargo. And respondent's counsel, at page 10 of his brief, quotes from such policy two clauses upon which the contention is based. If the question is to be considered at all, it should receive accurate consideration.

The policy does, indeed, contain the quoted words,

though they have lost their proper significance by deletions and by separation from the context.

The full text of the clause first cited is:

> " Warranted by the insured free from damage or
> " injury from dampness, change of flavor or being
> " spotted, discolored, musty or mouldy, except
> " caused by actual contact of sea water with the
> " articles damaged, occasioned by sea perils. In
> " case of *partial loss* by sea damage to dry goods,
> " cutlery or other hardware, the loss shall be as-
> " certained by a separation and sale of the portions
> " only of the contents of the packages so damaged,
> " and not otherwise; and the same practice shall
> " obtain as to all other merchandise, as far as
> " practicable."

The warranty against freedom from average having been opened by a loss exceeding seven per cent. (*see Policy*), the clause now quoted, might, under some circumstances, if sugars are to be deemed merchandise, be applicable to measure the loss. By its terms, however, it would be applicable only to cases of "partial loss," and moreover only to cases of "partial loss by sea damage."

It would play no part whatever in the case of a total loss, either actual or constructive, except for the purpose of determining whether the damage was sufficient to constitute a constructive total loss. The constructive total loss being established, the clause would have no function, In this case, where less than one-eighth of the cargo survived the disaster at all, and that one-eighth was burdened with expense far exceeding one-half of its value, a constructive total loss existed. The clause therefore has no function.

The counsel for the respondent, for further support to his contention, cites another provision of the Atlantic Mutual policy.

> " Each invoice of other goods not less than $5,000
> " insured value, subject to separate average as if
> " separately insured; also each invoice of less than
> " $5,000 subject to separate average if the damage
> " amounts to an average on $5,000."

A suggestion is made by the counsel for the respondent, at page 10 of his brief, that the cargo of the *John E. Sayre* was in three separate invoices, and that there is no sufficient evidence to establish a constructive total loss of each of the invoices.

There were indeed nominally three invoices; but not invoices of such a character as to put this clause of the policy in operation. The sugars were all shipped by Ker & Company, and all were shipped to the same consignment. They were sold by the shippers to the libellant as an entire cargo (*Drummond*, 12), and under a contract stipulating for a "usual assortment" of grades (*Drummond*, 14). Such "usual assortment" was secured only by a consolidation of the three so-called invoices.

Moreover, even considered as separate invoices, the proofs establish a constructive total loss of each invoice. The gross weight of all sugars that came out of the wreck was only 334 tons, and of this weight one-half belonged to the salvors, leaving only 167 tons to which the libellant had any title as the sugars reached the Newfoundland coast. There were 1,413 tons in one so-called invoice, 500 tons in another, and 546 tons in the other. Assuming that every ounce of the sugars which came out of the wreck was covered by the smallest invoice—the invoice for 500 tons, it is apparent that not enough sugars survived to enable the insurer to avoid a constructive total loss. Moreover such a rule cannot be invoked by any one except the direct insurer; and if the rule has any theoretical merit, it is to be assumed, from the course of action of the parties, that the facts did not fairly put it into operation.

Second.

The counsel for the respondent omits to note in his consideration of the case of *Tom* vs. *Smith*, 3 Caines Reports, 245, on page 12 of his brief, that the decision of the Court in dismissing the claim, turned upon the fact that the

insured accepted his *entire* cargo at the port of distress, sold it there at a price "much about the same price it "would have yielded in New York," the port of destination, invested the proceeds partly in rum and molasses, and partly in bills of exchange, later sustained losses on these new ventures, in part through change of market and in part through non-payment of certain of the bills of exchange, and did not look to his underwriters for these indirect losses until three years after the original disaster. The case, therefore, is scarcely pertinent to the present argument, although it is in a measure useful as indicating that the only relief which the insurer of profits could secure by an abandonment, would be to secure possession and title to the saved portion of the goods on paying not only the insurance on profits, but in addition, either the insured value of the cargo, if insured, or the prime cost of the cargo, if uninsured.

To apply this rule to the case at bar, the respondent, upon an abandonment, if one has been formally tendered and accepted, would have had the right to take delivery of some 300 tons of sugar worth $20,000 upon paying, therefor, $165,000 to the Atlantic Mutual Insurance Company, $10,000 to salvors, &c., and $15,000 to the libellant —an "absurd alternative," as Judge Brown says (*Record, p.* 74).

Third.

The counsel for the respondent urges that insurance against total loss imposes no liability upon the insured in respect of a constructive total loss.

The cases upon which he relies on pages 14–18 of his brief are *all of them* cases in which the goods were insured "free of particular average."

In respect of goods so insured it is held in some States, though not in all, that there can be no constructive total loss.

The cases which the counsel cites, it will be seen, do not go far enough for the respondent's relief. In those States in which a constructive total loss is allowed, even when cargo is insured free of particular average, it is naturally held that insurance free of particular average is substantially the same as insurance against total loss only.

In those States, however, where it is held that there can be no constructive total loss upon goods which are insured free of particular average, it is held that insurance against "total loss only" covers a constructive total loss, and the distinction is sharply drawn between a total loss and an actual or absolute total loss.

The counsel for the respondent urges that the policy issued by the respondent "comes within the line of de-"cisions upon memorandum articles which are wholly "free of particular average" (*p.* 16), alleging in support of his contention that the exemption from partial loss in the cargo policy was restricted to a percentage, but that the exemption in the profit policy contained no such limit. In this he errs. The cargo policy does indeed contain the provision that sugar is warranted by the insured free from average under seven per cent. unless general (*Ex.* 9, *p.* 42), but the profits policy also contains exactly the same clause respecting sugar (*Ex.* 11, *p.* 56). In respect of "profits," the policy not only does not contain a restriction of the exemption to a percentage, but does not contain any exemption whatever in respect of partial losses (*Ex.* 9, *pp.* 55-58).

Nor does the certificate of insurance contain any such exemption (*Ex.* 4, *p.* 40).

There is no peculiar law applicable to "memorandum articles." The insurer and the insured are governed in respect of such articles by the specific provisions of the policy under ordinary rules of construction. If the policy provides that such articles are warranted entirely free of average, unless general, the loss is adjusted accordingly, and if it provides that the articles are warranted free of particular average under a stated percentage the loss is adjusted upon such lines.

Fourth.

We refer again to our contention that the prime cost of the sugars is not material to the consideration of whether or not profits survived the disaster. The only basis upon which the respondent is entitled to consider the existence of profits is upon the basis of a value for the sugars of $166,145, that value being stated to and accepted by the respondent as the insured value of the cargo at the time the insurance on profits was made (*Record, p.* 11).

Fifth.

The counsel for the respondent, on page 22 of his brief, indicates that he does not appreciate one of the classes of damage which the sugars which reached Montreal sustained. Those sugars came to Montreal in a mixed assortment, not in the "usual assortment." Iloilo sugars are in three grades, and they are bought and sold in the market under the "usual assortment" of one-eighth of grade No. 1, two eighths of grade No. 2, and five-eighths of grade No. 3 (*Drummond*, 14). The grade of the sugars which came forward could not be determined, some of the sugars being wet and others having been re-bagged. It was impossible to determine how nearly the sugars, as delivered, approached the "usual assortment" (*Drummond*, 14).

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